

536a(d) because the respondent filed an Application for Review and Modification without good cause shown as required by statute before such application can be filed.¹

In contrast, respondent contends the ALJ did not err when she denied claimant's request for post-award attorney fees and the Board should affirm the ALJ's decision. Respondent argues that K.S.A. 44-536(g) is clear and unambiguous and the ALJ has the discretion of whether or not to award post-award attorney fees where the attorney's services rendered resulted in a denial of additional benefits. There were no benefits ordered by the ALJ. Therefore, the respondent argues an award of post-award attorney fees is not mandatory.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the records, considering the briefs, and the parties' arguments, the Board makes the following findings and conclusions:

On April 9, 1999, respondent filed an Application for Review and Modification of the Board's January 27, 1998, Order alleging that claimant's work disability had diminished. Thereafter, on April 29, 1999, respondent filed an Amended Application for Review and Modification, this time alleging that claimant was working and his wages had increased changing his entitlement to permanent partial disability benefits. Because claimant's attorney would not produce the claimant for deposition testimony for respondent to inquire as to claimant's post-award employment efforts and possible post-award earnings, the respondent filed, on April 9, 1999, a Motion to Compel Claimant's Testimony.

In May of 1999, claimant then filed the following motions: (1) Motion to Dismiss Application for Review and Modification, (2) Motion and Amended Motion for Attorney Fees, (3) Motion for Interest on Compensation, and (4) Motion for Penalties. On June 17, 1999, all of the foregoing motions were considered at a hearing before the ALJ. But, at the hearing, claimant's attorney notified the ALJ that claimant did not wish to address his Motion for Penalties or the Motion for Interest on Compensation because respondent had paid claimant all the benefits due. In regard to the attorney fee motion, claimant's attorney requested the ALJ to award her attorney fees at \$150 per hour for eight hours of travel time to and from the hearing, two hours for the hearing, and five hours for preparing pleadings and responding to motions.

In a June 23, 1999, Order, the ALJ denied claimant's Motion to Dismiss Application for Review and Modification and claimant's Motion for Attorney Fees. The ALJ granted respondent's Motion to Compel Claimant's Testimony. Claimant timely appealed that Order to the Board. Attached to claimant's brief to the Board was an itemization of time that claimant's attorney was requesting the Board to order the respondent to pay at \$150

¹ See K.S.A. 44-528(a).

per hour for 39.25 hours which included 2.25 hours of time spent after the June 17, 1999, motion hearing. At the June 17, 1999, motion hearing, as noted above, claimant only requested attorney fees for fifteen hours.

In a June 27, 2000, Order, the Board affirmed the ALJ's June 23, 1999, Order. But the Board reversed the portion of the ALJ's Order that denied claimant's request for attorney fees and remanded the attorney fee issue to the ALJ to preserve the issue until such time as the ALJ made a final decision on respondent's Application for Review and Modification. The Board, however, addressed claimant's argument that an award of post-award attorney fees is mandatory because the statute uses the word "shall". In the Board's June 27, 2000, Order, the Board discussed this issue and found in part as follows:

Finally, claimant argues the judge erred by denying her request for attorney fees. Claimant argues that an award of attorney fees is mandatory because the statute uses the language "shall". The Appeals Board disagrees. That mandatory language refers to cases where there is "no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits." The language of K.S.A. 1999 Supp. 44-536(g) goes on to provide that "If the services rendered herein result in a denial of compensation, the director **may** authorize a fee to be paid by the respondent." (Emphasis added.) There were no benefits ordered by Judge Fuller's June 23, 1999, Order. Therefore, an award of attorney fees is not mandatory.

The ALJ, in a November 9, 2000, Decision granted respondent's request to modify claimant's award based on claimant's deposition testimony taken by respondent on August 18, 2000. Claimant's original award was reduced from a 70 percent work disability to a 27 percent work disability commencing July 18, 1999, until October 18, 1999. Thereafter, claimant was limited to an award based on his functional impairment of 18 percent because claimant was earning a wage greater than his pre-injury average weekly wage.

Claimant timely appealed that Decision to the Board. In an April 25, 2001, Order, the Board affirmed the ALJ's November 9, 2000, Decision, but remanded claimant's claim for attorney fees because the ALJ had failed to address the attorney fee issue in the Decision.

The ALJ, without holding another hearing, entered the May 22, 2001, Decision that denied claimant's request for post-award attorney fees. The ALJ found claimant's allegation that respondent's Application for Review and Modification was a frivolous pleading was without merit. The ALJ further found, in reviewing claimant's attorney's itemization of time spent, that claimant's attorney could have saved a substantial amount

of time if she would have voluntarily produced the claimant for respondent to take his deposition testimony.

Attached to claimant's present brief to the Board is claimant's attorney's itemization of time spent which is also the same itemization of time spent that was attached to claimant's brief before the Board when claimant appealed the ALJ's June 23, 1999, Order. Claimant is requesting that the Board award post-award attorney fees for 39.25 hours for total fees of \$5,887.50.

As previously noted, the Board's June 27, 2000, Order already addressed claimant's argument that K.S.A. 44-536(g) is mandatory because it contains the word "shall". The Board, at that time, found that K.S.A. 44-536(g) uses the word "may" instead of "shall" which makes the ALJ's and the Board's decision on whether an award of post-award attorney fees is appropriate discretionary and not mandatory when the attorney's post-award services rendered result in a denial of additional compensation.

The Board concludes that the ALJ's May 22, 2001, Decision that denied claimant's request for post-award attorney fees should be affirmed. The June 17, 1999, motion hearing was the first hearing before the ALJ that claimant requested post-award attorney fees. In that hearing, claimant dismissed his motions for penalties and interest and claimed 15 hours in attorney fees for attending the June 17, 1999, hearing and for preparing pleadings leading up to the hearing. Thereafter, claimant claimed 39.25 hours, based on an itemization of time spent which only showed that 2.25 hours of that total amount of time was spent for attorney's services after the June 17, 1999, hearing.

The Board agrees with the ALJ that, if claimant's attorney would have voluntarily produced claimant for his deposition testimony, a large portion of the attorney fees requested would not have been necessary. The Board also questions the merit of claimant's argument that the word "may" as contained in K.S.A. 44-536(g) means "shall". Additionally, at least a portion of the claimant's post-award attorney fees were requested for services performed concerning motions for penalties and interest dismissed at the first post-award hearing held on June 17, 1999. At that hearing, claimant only requested attorney fees for services performed in connection with his Motion to Dismiss Application for Review and Modification and to defend against respondent's Motion to Compel Claimant's Testimony. Claimant's request for post-award attorney fees under K.S.A. 44-536(g), in this case, needs to be balanced against the undue time and expenses respondent incurred in answering and defending against assertions made by claimant that were unnecessary and neither supported by law or fact. On balance, under the unique circumstances of this case, the Board finds respondent should not be burdened with further additional expenses and, therefore, denies claimant's request for post-award attorney fees. Additionally, the Board affirms the ALJ's finding that respondent's Application for Review and Modification was not a frivolous pleading, therefore, K.S.A. 44-536a(d) does not apply.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Pamela J. Fuller's May 22, 2001, Decision, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director